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Religious Liberty and Bus Transportation

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RELIGIOUS LIBERTY AND BUS TRANSPORTATION

In 1941 the Supreme Court of Mississippi declared that the constitutional barrier which secures the independence of church and state ". . . must not be so high that the state, in discharging its obligation as parens patriae, cannot surmount distinctions which, viewing the citizen as a component unit of the state, become irrelevant."[1] The state must exercise vigilance in discharging its obligations to those who, although actively engaged in religious practice, are also objects of its bounty and care, and who, regardless of any other affiliation, are nonetheless wards of the state. Furthermore, continued the court, "there is no requirement that the church should be a liability to those of its citizenship who are at the same time citizens of the state, and entitled to privileges and benefits as such."[2]

This same idea was succinctly expressed by Thomas Jefferson when he declared in his "Bill for Establishing Religious Freedom" that "our civil rights have no dependence on our religious opinions."

These statements of Jefferson and the Mississippi court are based on principles of religious liberty and equality under the law. Whatever the individual's religious belief and practice, his privileges and duties as a citizen are neither more nor less than those of his fellow citizens. Whatever the individual's religious belief and practice, the duties and rights of the state in his regard are neither more nor less than they are in the case of his fellow

[1] Chance v. Mississippi State Textbook Bd., 190 Miss. 453, 200 So. 706, 710 (1941).

[2] *Ibid.*

citizens. In the distribution of its benefits, as in the imposition of its obligations, the state must look upon its citizens with a gaze that throws out of focus any credal background.

Religious liberty demands freedom from both previous restraints and subsequent punishments. When civil incapacitations and economic reprisals are imposed on the exercise of religion, religious liberty is being abridged. If a citizen is denied the right to share in welfare benefits because of his religious belief, his religious freedom is being violated.

When courts in the interpretation of similar and identical constitutional principles and provisions reach contradictory conclusions in matters involving our fundamental liberties, it is imperative that students of civil liberties assess the reasoning of the several courts and, if necessary, take issue with the line of reasoning employed. It is the purpose of the present writer to assess the reasoning of a number of courts in cases involving the right of children who exercise their religious liberty in the choice of school to share equally with other children in such welfare legislation as bus transportation.

I.

EQUAL PROTECTION OF THE LAWS

The fourteenth amendment to the Constitution declares in part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The full meaning and importance of this clause has been slow to evolve because of judicial reluctance to carry out the intent and purpose of this part of the amendment.[3] Recent years, however, have seen considerable and substantial

[3] Tussman and tenBroek, *The Equal Protection of Laws*, 37 CALIF. L. REV. 342 (1944).

progress[4] in the development of the equality doctrine[5] as is evidenced by the decisions of the Supreme Court of the United States.[6]

Though "the equal protection clause . . . is not susceptible of exact delimitation,"[7] its meaning has gradually evolved through judicial formulations. In one case the Supreme Court declared that ". . . the equal protection of the laws is a pledge of the protection of equal laws."[8] That is, laws must themselves be fair—"equal." This formulation has been repeatedly reaffirmed by the courts.[9]

Justice Field clarified the meaning of the equality clause when he declared that such legislation necessarily ". . . affects alike all persons similarly situated . . . ."[10] The Supreme Court later stated that the fourteenth amendment ". . . requires that all persons . . . shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."[11]

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4 Shelley v. Kraemer, 334 U.S. 1 (1948).

5 Barrows v. Jackson, 346 U.S. 249 (1953).

6 Brown v. Board of Education, 347 U.S. 483 (1945). In the Shelley case, *supra* note 4, the Court held that the state may not enforce restrictive covenants because such action would result in a denial of the equal protection of the laws to non-Caucasians; in the Barrows case, *supra* note 5, the Court denied damages for the breach of such covenants; and in the monumental Brown decision the Court declared that "separate educational facilities are inherently unequal." See p. 495. See also McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Henderson v. United States, 339 U.S. 816 (1950); Sipuel v. Oklahoma, 332 U.S. 631 (1948); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); McKissick v. Carmichael, 187 F.2d 949 (4th Cir. 1951); Corbin v. County School Board, 177 F.2d 924 (4th Cir. 1947).

7 Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 37 (1928).

8 Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

9 See Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942); Truax v. Corrigan, 257 U.S. 312 (1921); Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902).

10 Barbier v. Connolly, 113 U.S. 27, 32 (1885).

11 Hayes v. Missouri, 120 U.S. 68, 71 (1887). See Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936); Colgate v. Harvey, 296 U.S. 404 (1935); Truax v. Corrigan, 257 U.S. 312 (1921); Truax v. Raich, 239 U.S. 33 (1915); Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Barbier v. Connolly, 113 U.S. 27 (1885).

". . . [E]quality of rights . . . is the foundation of free government . . . . arbitrary selection can never be justified by calling it classification."[12] Classification may not be arbitrary; it ". . . must rest upon a difference which is real, . . ." stated Justice Brandeis in dissent in another case, "so that all actually situated similarly will be treated alike . . . ."[13]

Every classification must look to the *purpose* of the law. "[T]he object of the classification must be the accomplishment of a *purpose* or the promotion of a policy, which is within the permissible functions of the State . . .," so continued the well reasoned dissent of Justice Brandeis.[14] In another case the Court observed that classification ". . . must rest upon some ground of difference having a fair and substantial relation to the *object* of the legislation, so that all persons similarly circumstanced shall be treated alike."[15] Hence, a reasonable classification includes not simply all persons who are similarly situated, but rather all persons who are similarly situated with respect to the purpose of the law. Classification, therefore, ". . . must regard real resemblances and real differences between things, and persons, and class them in accordance with their pertinence to the purpose in hand."[16]

Legislative classification, declared the Supreme Court of Indiana, must be based upon some substantial difference which is ". . . germane to the subject and purposes

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12 Gulf, C. & S.F.R.R. v. Ellis, 165 U.S. 150, 160, 159 (1897).

13 Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 406 (1928) (Brandeis' dissent).

14 *Ibid.* (Emphasis added).

15 Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). (Emphasis added).

16 Truax v. Corrigan, 257 U.S. 312, 338 (1921). In Sterrett & Oberle Packing Co. v. Portland, 79 Ore. 260, 154 Pac. 410, 414 (1916), the Supreme Court of Oregon said: "Where a classification is based upon no reasonable ground and bears no just or proper relation to the object of the law, but is in fact an arbitrary selection and results in unjust discriminations, it cannot be justified, and the act attempting to make such classification must be declared void."

of the legislation. . . ."[17] The criterion of a reasonable classification is its materiality to the *purpose* of the law. "The objects and purposes of a law present the touchstone for determining proper and improper classification."[18]

Constitutional rights are personal rights. ". . . [T]he essence of the constitutional right," declared Justice Hughes, "is that it is a personal one. . . . It is the individual who is entitled to the equal protection of the laws. . . ."[19] This principle was reiterated in *Shelley v. Kraemer*[20] where the Court asserted that "the rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." Stating the principle negatively, the Court remarked: "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."[21]

Group membership could not be determinative of an individual's constitutional rights, because, declared the Supreme Court in the *Gaines* segregation case, the ". . . petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws. . . ."[22] Twelve years later the Supreme Court

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17 Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N.E. 465, 467 (1927). In School City of Elwood v. State, 203 Ind. 626, 180 N.E. 471, 474 (1932), the Supreme Court of Indiana declared: "The classification, to be constitutional, must be reasonable and natural, not capricious or arbitrary; it must embrace all who naturally belong to the class, and there must be some inherent and substantial difference germane to the subject and purpose of the legislation between those included within the class and those excluded." See also Fairchild v. Schanke, 113 N.E.2d 159 (Ind. 1953); Evansville & Ohio Valley Ry. v. Southern Indiana Rural Electric Corp., 231 Ind. 648, 109 N.E.2d 901 (1953); Martin v. Loula, 208 Ind. 346, 194 N.E. 178 (1935); Bolivar Twp. Board of Finance v. Hawkins, 207 Ind. 171, 191 N.E. 158 (1935); *In re* Milo Water Co., 128 Me. 531, 149 Atl. 299 (1930); State v. Cullum, 110 Conn. 291, 147 Atl. 804 (1929); Silver v. Silver, 108 Conn. 371, 143 Atl. 240 (1928).

18 State v. Mason, 94 Utah 501, 78 P.2d 920, 922 (1938).

19 McCabe v. Atchison, T. & S.F.R.R., 235 U.S. 151, 161 (1914).

20 334 U.S. 1, 22 (1948).

21 *Id.* at 22.

22 Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 351 (1938).

again reaffirming the principle that rights are personal, asserted that "it is fundamental that these [segregation] cases concern rights which are personal and present."[23]

The equal protection clause demands, first, that persons similarly situated with respect to the purpose of the law be treated alike, and, secondly, that rights are personal.

II.

RELIGIOUS LIBERTY UNDER THE CONSTITUTION

The first amendment to the Constitution states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ." This final draft of the amendment is considerably clarified by the more extended form of the original draft introduced in the House of Representatives by James Madison. The wording of this draft, moreover, has particular significance for our present purpose. This initial version of the amendment stated:[24]

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

The civil rights, whether constitutional or legislative, of no person shall be abridged on account of his religious belief or religious exercise. Nor shall a person's rights of conscience be infringed in any manner whatever — whether by previous restraints or subsequent reprisals.

Chief Justice Waite declared that the first amendment of the Constitution ". . . was intended to allow every one . . . to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved

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23 Sweatt v. Painter, 339 U.S. 629, 635 (1950).

24 1 ANNALS OF CONG. 434 (1789-1791).

by his judgment and conscience. . . ."[25] In the execution of these "duties" the individual person is to enjoy complete freedom, so long as they are ". . . not injurious to the equal rights of others. . . ."[26] The state may not violate this freedom by the imposition of subsequent punishments, because, as Jefferson so eloquently declared:[27]

> Almighty God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hyprocrisy and meanness. . . .

"The guaranties of civil liberty . . .," dissented Justice Stone, ". . . presuppose the right of the individual to hold such opinions as he will and to give them reasonably free expression . . . . the very essence of the liberty which they guaranty is the freedom of the individual from compulsion as to what he shall think and what he shall say. . . ."[28] Consequently, the individual cannot be compelled "to bear false witness to his religion,"[29] or to renounce it in whole or in part because of governmental pressures. The state may not exert pressures, whether by previous restraints or subsequent reprisals, that operate as compulsions determining what the individual shall think in religious matters. Nor may it exert unreasonable pressures that coerce the individual to renounce his religious convictions in practice.

The religious liberty guaranty of the first amendment is not simply a guaranty against its obliteration. It guaranties the exercise of religion without interference, without obstruction, without the imposition of subsequent re-

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25 Davis v. Beason, 133 U.S. 333, 342 (1890).

26 *Id.* at 342.

27 2 THE WORKS OF THOMAS JEFFERSON 438-439 (Ed. P.L. Ford 1904).

28 Minersville School Dist. v. Gobitis, 310 U.S. 586, 604 (1940) (dissenting opinion).

29 *Id.* at 604.

prisals or the denial of civil rights because of its practice. This was clearly stated in an important dissent:[30]

> The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary, the Constitution, by virtue of the First and the Fourteenth Amendments, has put those freedoms in a preferred position.

Hence the commands of these amendments are not limited to cases in which the liberty is being subjected to attack. "They extend at least to every form of taxation which, because it is a condition of the exercise of the privilege, is capable of being used to control or suppress it."[31] Whether the restraint used to control or suppress religious exercise is in the form of taxation or in the discriminatory denial of equal rights under the law is inconsequential. Subsequent incapacitations or reprisals, no less than previous restraints, restrict the free exercise of religion. The individual has a legal personal right to share equally in the benefits of the law. If this right is abridged because of his religious exercise, he is suffering a reprisal that is restrictive of his religious liberty. Such reprisals tend to restrict or suppress the exercise of religion.

In the decision which nullified the *Jones* decision of the previous year, Justice Douglas stated for the Court that the flat license tax on the distribution of religious literature was "a condition of the exercise of . . . constitutional privileges. The power to tax the exercise of a privilege is the power to control or suppress its enjoyment."[32] Regarding the imposition of burdens on the exercise of religion, the Supreme Court declared that "those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources neces-

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30 Jones v. Opelika, 316 U.S. 584, 608 (1942).

31 *Id.* at 608.

32 Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943).

sary for its maintenance."[33]

Rights guarantied by the first amendment cannot be restricted by local governmental authority. "A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution."[34] On the basis of this principle, the state may not discriminate in the distribution of its welfare benefits against individual citizens because they are engaging in the exercise of a right guarantied by the first amendment.

The power to impose legal discriminations on the exercise of religion is the power to control or suppress its enjoyment. When civil disqualifications and economic reprisals are directly consequent upon the exercise of religion, the state is suppressing the exercise of religion or at least making the exercise intolerably burdensome for those who do not have the resources necessary to supply the benefits of which they have been deprived. Subsequent reprisals are often as destructive of religious liberty as are previous restraints. The citizen who is denied the benefits of civilized society because of his religious practice does not enjoy the free exercise of his religion. Discrimination is the deadly poison of liberty.

By demanding that some of her citizens renounce certain religious practices as a condition of receiving the equal protection of the laws, a state grossly violates both the first and fourteenth amendments. By thus demanding the surrender of religious beliefs and/or practices as a condition of equality under the law, the state is openly, though indirectly, exerting compulsion against the free exercise of religion. "Official compulsion to affirm what is contrary to one's religious beliefs," asserted Justice Murphy, "is the antithesis of freedom of worship. . . ."[35] A *pari,*

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33 *Id.* at 112.

34 *Id.* at 113.

35 West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (concurring opinion).

official compulsion to renounce what is demanded by one's religious beliefs as a condition of equality under the law is the antithesis of freedom of religion.

The religious liberty guarantied by the first amendment is not an absolute. This amendment has two aspects: [36]

> [It] . . . forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. . . . [A]nd safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts, —freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.

Of increasing importance during the last decade in the limitation of religious liberty has been the application of the clear and present danger test.[37] A district court referring to the test in invalidating a compulsory flag-salute statute, asked: ". . . must the religious freedom of plaintiffs give way because there is a clear and present danger to the state if these school children do not salute the flag, as they are required to do?"[38] The court found that no such danger would result if the children were allowed to refrain from saluting because of their conscientious scruples. The court set down the principle: "To justify the overriding of religious scruples . . . there must be a clear justification therefore in the necessities of national or community life."[39]

On appeal to the Supreme Court this decision was affirmed and the *Gobitis*[40] decision reversed on the grounds that the refusal of children to salute the flag did not con-

36 Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

37 Prior to the adoption of this test other norms had been used to limit religious exercise, *e.g.*, the traditions and customs of our nation in Davis v. Beason, 133 U.S. 333 (1890). The clear and present danger test was first applied in a religious liberty case in Cantwell v. Connecticut, 310 U.S. 296 (1940).

38 Barnette v. West Virginia, 47 F. Supp. 251 (S.D. W.Va. 1942).

39 *Id.* at 253-254.

40 Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

stitute a clear and present danger of a kind the state has a right to prevent.[41] Justice Jackson, stating the test, asserted that freedom of speech and of press, or assembly and of worship may not be infringed on slender grounds. "They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."[42]

". . . [C]lear and present danger," observed one writer, "has now become a formidable weapon for the defense of the First Amendment freedoms. . . . "[43] It is submitted that on the basis of this doctrine a state may not, conformably with the guaranty of the first amendment, discriminate or take economic reprisals against a person because of his religious exercise unless that exercise creates a clear and present danger of an evil that the state has a right to suppress.

The preservation of religious liberty is essential to the preservation of democracy. The arbitrary violation of religious freedom debilitates democracy and overrides the guaranties of the first amendment.[44]

> Freedoms are limitable only where vital to the protection of an imperative paramount interest of the state. It is an inherent power of sovereignty to regulate conduct inimical to the public welfare. . . . These treasured civil and religious liberties yield only to grave public exigencies. . . . Individual liberty of conscience, of speech and of press, may not be *indirectly* qualified by political incapacitations. (Emphasis added.)

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41 West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

42 *Id.* at 639.

43 Green, *The Supreme Court, The Bill of Rights and the States,* 97 U. OF PA. L. REV. 608, 636 (1949).

44 Morgan v. Civil Service Comm'n, 131 N.J. 410, 36 A.2d 898, 902-903 (1944).

III.

FREEDOM OF EDUCATIONAL CHOICE

In the light of the foregoing discussion there can be little doubt as to the constitutional right of the child to elect, on the basis of religious convictions, to attend a parochial school because of his desire to learn, in addition to secular subjects, more about the truths of his particular religion. Moreover, a child may have a religious duty, incumbent upon him and his parents, to attend a parochial school. Parents may, in addition, have firm convictions, based upon a deep faith, that education without God is partial and incomplete, that education which ignores God in its curriculum teaches with resounding eloquence that God is unimportant, or that He has no place in our society, or even implicitly that He does not exist. These convictions may induce parents to send their children to parochial schools.

Regarding the right of parents to send their children to parochial schools, the Supreme Court declared that the compulsory public school education law of Oregon ". . . unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[45] Coercive uniformity and conformity are contrary to the principles of democracy. Taking cognizance of the "additional obligations" of citizens that transcend the scope and competence of government, the Court stated:[46]

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.

45 Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (dictum).

46 *Id.* at 535 (dictum).

> The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

"While the First Amendment was not mentioned in the Court's opinion the subsequent absorption of its religious clauses into the Fourteenth Amendment seems to make the case relevant to the question of their proper interpretation."[47] This is borne out by the Court in another case where, citing the *Pierce* doctrine as authority, it declared that "this Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school. . . ."[48]

Four years prior to the *Everson* decision, the Court had declared in the *Barnette* flag-salute case that both parent and child ". . . stand on a right of self-determination in matters that touch individual opinion and personal attitude."[49] Further urging the unacceptability of coercive action towards uniformity in matters of personal convictions, the Court stated:[50]

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

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47 THE CONSTITUTION OF THE UNITED STATES OF AMERICA 765 (1953). This analysis and interpretation of the Constitution was prepared by the Legislative Reference Service under the editorship of Edward S. Corwin in 1953. Writers consider the Pierce case an important decision in the constitutional law of civil religious liberty. See PFEFFER, CHURCH, STATE AND FREEDOM 513-515 (1953); Fahy, *Religion, Education, and the Supreme Court*, 14 LAW & CONTEMP. PROB. 73, 74-76 (1949). It is significant that the Pierce case is included in HOWE, CASES ON CHURCH AND STATE IN THE UNITED STATES (1952). It is also included in AMERICAN STATE PAPERS ON FREEDOM OF RELIGION (1949).

48 Everson v. Board of Education, 330 U.S. 1, 18 (1947).

49 West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943).

50 *Id.* at 642.

> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The highest court of New York recognized the prior rights of parents in the education of their children when it declared that "the State has no desire to and could not if it so wished compel children to attend the free public common schools when their parents desire to send them to parochial schools. . . ."[51]

The Supreme Court has spoken in forceful terms of the rights of parents and children.[52] The Court repeatedly has emphasized these rights.[53] In terms that recall the principles of the Declaration of Independence, they reiterated the priority of the rights of parents in the direction and education of their children.[54]

An analysis of the *Everson* opinion reveals another strong judicial argument in defense of the right of children to attend parochial schools on the basis of their religious convictions. Justice Black argued for the majority of the Court that, because of the religious liberty guaranty of the first amendment, "New Jersey cannot hamper its

51 Judd v. Board of Education, 278 N.Y. 200, 15 N.E.2d 576, 582 (1938).

52 Prince v. Massachusetts, 321 U.S. 158 (1944).

53 *Id.* at 165-66. (1) "The rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief. . . ." *Cf.* West Virginia Bd. of Educ. v. Barnette, *supra.* (2) ". . . the parents' authority to provide religious with secular schooling, and the child's right to receive it, as against the state's requirement of attendance at public schools." *Cf.* Pierce v. Society of Sisters, *supra.* (3) ". . . children's rights to receive teaching in languages other than the nation's common tongue. . . ." *Cf.* Meyer v. Nebraska, 262 U.S. 390 (1923).

54 321 U.S. 158, 166 (1944). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. *Pierce v. Society of Sisters, supra.* And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter."

citizens in the free exercise of their own religion,"[55] *i.e.*, New Jersey cannot discriminate against those children who have exercised their religious liberty in the choice of school. "Consequently," he continued, "[New Jersey] cannot exclude individual Catholics, Lutherans, . . . or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation."[56] The individuals in question in the instant case were parochial school children. They may not be denied welfare benefits because of their religious exercise in the choice of school. Finally, the Court cautioned that in its zeal to prohibit state aid to religion, "we must be careful . . . to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief."[57] Again, the religious belief in question was that involved in the choice of school on the basis of religious convictions.

The individual child who desires, in the exercise of his religion, to attend a parochial school is protected against the abridgment of his right by the first amendment. Concerning the child's "relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, . . ." declared the Supreme Court in *Davis v. Beason*[58]—with the usual reservations. If the child, through his parents, believes that his relations to his Maker impose the obligation of attending a school that will teach him sacred subjects in addition to secular subjects, there is no state official, high or petty, who may infringe upon this right. Under the Constitution the child "was granted the right

55 Everson v. Board of Education, 330 U.S. 1, 16 (1947).

56 *Ibid.*

57 *Ibid.*

58 133 U.S. 333, 342 (1890).

to worship as he pleased and to answer to no man for the verity of his religious views."[59]

IV.

BUS TRANSPORTATION: AID TO THE CHILD

Inasmuch as judicial opinion is sharply divided as to whether or not bus transportation for school children is primarily for the benefit of the child or in aid of the school, the writer proposes to treat the transportation cases from two viewpoints: first, from the viewpoint of the courts which hold that the services are primarily for the benefit of the child; and, secondly, from the viewpoint of the courts which hold that the service is primarily in aid of the school.

In 1938 it was held by the Court of Appeals of Maryland that, since children are the primary beneficiaries of bus transportation, such welfare benefits may be extended to parochial school children.[60] The board of education contended that the transportation of parochial school children was a diversion of public funds to a private purpose, and a contribution to the maintenance of a place of worship in contravention of the Declaration of Rights of the state.[61]

The Maryland court considered the first contention under two aspects: (1) whether it was in the furtherance of a public function to compel children to attend some school, and (2) whether it was in the furtherance of a public function to protect school children from traffic hazards. The state's interest in the public function of education is evidenced by the enactment of a compulsory

59 United States v. Ballard, 322 U.S. 78, 87 (1944).

60 Board of Education v. Wheat, 174 Md. 314, 199 Atl. 628 (1938).

61 *Id.* at 629.

school attendance law. Parochial school children, once having elected to attend a denominational school, have a duty under the attendance law to attend that school.[62] Since these children "are complying with the law in going to such a school as the parochial school involved in this case," declared the court, "their accommodation in the buses appears to the court to be within the proper limits of enforcement of the duty imposed."[63] The state, having imposed the duty of attendance at a public, private, or parochial school, has the power to make compliance with the duty easier.

Furthermore, the state has the power to protect its children from dangers while they are carrying out duties imposed by law. "Compliance having been made dangerous in a much greater degree," stated the court, "removal of the danger to any extent would seem to be within the same public function."[64]

With regard to the contention that the transportation provision aids sectarian schools, the court enunciated a principle that is basic in all legislation for the public welfare. "The fact that the private schools, including parochial schools, receive a benefit from it," declared the court, "could not prevent the Legislature's performing the public function."[65] The conclusion that the transportation act "must be regarded as one within the function of enforcing attendance at school," reasoned the court, "renders it unnecessary to consider separately the objection that a religious institution is aided."[66] Add to this, there is no substantial and direct aid given to parochial schools. "The institution must be considered as aided only incidentally, the aid only a byproduct of proper legis-

62 *Id.* at 631.
63 *Id.* at 632.
64 *Ibid.*
65 *Ibid.*
66 *Ibid.*

lative action."[67]

In this reasoning of the court of appeals, the right of the individual child to share in the welfare benefits of his state was treated as a personal right. Consequently, the court found that incidental secondary effects of the welfare law providing transportation could not deprive parochial school children of the right to share in welfare benefits equally with other children similarly situated with respect to the purpose of the law.

This interpretation of constitutional principles was reaffirmed by the court of appeals four years later in another case involving state aid for the transportation of children attending parochial schools.[68]

An act provided "for the transportation to and from school of children attending schools in St. Mary's County not receiving state aid."[69] Under the terms of the act, public funds were distributed, upon contractual agreements, on a mileage basis for the operation of parochial school owned buses. The provision was attacked, among other reasons, as "unconstitutional because it authorizes the application of public funds to private purposes."[70] The court referred to a former case[71] in which the doctrine was enunciated that the city might contract with private agencies to give the care and training to foundlings which it was the duty of the city to provide. The denominational control of institutions with which contracts were made, runs the doctrine, does not disqualify them for serving as the agencies of the city.[72]

In the case before the court, the parochial schools became the agents of the county in the transportation of

67 *Ibid.*

68 Adams v. Comm'rs, 180 Md. 550, 26 A.2d 377 (1942).

69 *Id.* at 378.

70 *Ibid.*

71 St. Mary's Industrial School v. Brown, 45 Md. 310, 335 (1898).

72 Adams v. Comm'rs, 180 Md. 550, 26 A.2d 377, 380 (1942).

children. The court said: [73]

> If the county's carrying the children of parochial schools by any means is a valid action, as we have decided in the Wheat case, one not necessarily to be considered a gift to the schools, the joining with the schools in supporting facilities already provided would seem valid.

Equality of treatment for all children, regardless of religious belief and practice, was finally attained by St. Mary's County in the matter of transportation in 1941. The act, said the court, "gave a right to all children attending schools in the county not receiving state aid, . . . to transportation . . . on the same terms [as public school children]. . . ."[74] In this enactment Maryland adhered to the ideals of religious liberty set forth in the first amendment to our Constitution, and provided for equal protection of the laws as guarantied by the fourteenth amendment. All the school children of the county who are similarly situated with respect to a particular need are treated alike. The need is a personal one. The right of the individual child to share equally in state provided benefits designed to alleviate a need common to a class is a "personal one" granted and guarantied by the fourteenth amendment.

Two years after the Court of Appeals of Kentucky had declared bus transportation for parochial school children unconstitutional[75] as giving aid to the school, the general assembly enacted another law for the express purpose of extending these welfare benefits to children who had elected to attend parochial schools. The purpose of the statute, according to its preamble, was "to promote the public welfare, comfort, health and safety" of children "attending school in compliance with the compulsory

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[73] *Ibid.*

[74] *Id.* at 379.

[75] Sherrard v. Jefferson County Bd. of Educ., 294 Ky. 469, 171 S.W.2d 963 (1942).

school attendance laws."[76] Bus transportation, the assembly intimated, is an aid to the child, since "the safety of all children is greatly endangered by their walking along highways without sidewalks to and from school and their health is greatly endangered in inclement weather; . . . ."[77] Consequently, "in order to facilitate their compulsory attendance at some school and to give aid and protection to children on the highways," the state authorized each county to furnish transportation to parochial school children "from its general funds."[78]

In *Nichols v. Henry*[79] it was, nevertheless, charged that the statute was invalid under the Kentucky constitution.[80] The court of appeals, accepting the legislative purpose as stated, declared that the act "constitutes simply what it purports to be — an exercise of police power for the protection of childhood against the inclemency of the weather and from the hazards of present-day highway traffic."[81] Furthermore, declared the court, the mere circumstance of sectarian teaching in Catholic and Protestant schools "does not change the purpose or effect of the Act nor . . . does it . . . compel any person to . . . contribute to the . . . maintenance of any . . . place [of worship] . . . ."[82]

It was also contended that the transportation of parochial school children involved the expenditure of public money for a private purpose.[83] However the court declared

76 Ky. Acts 1944, c. 156, as cited in Nichols v. Henry, 301 Ky. 434, 191 S.W.2d 930, 931 (1945).

77 *Ibid.*

78 *Ibid.*

79 301 Ky. 434, 191 S.W.2d 930 (1945).

80 *Id.* at 932.

81 *Ibid.*

82 *Ibid.* KY. CONST. § 5 declared that "the civil rights, privileges or capacities of no person shall be taken away, or in any wise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall . . . control or interfere with the rights of conscience."

83 Note 79, *supra* at 933.

that, in the light of progress in the field of humane and social legislation, and in view of the increased hazards and dangers of the highways, and in consideration of the compulsory school attendance laws applying to all children, "it cannot be said with any reason or consistency that tax legislation to provide our school children with safe transportation is not tax legislation for a public purpose."[84]

The court, answering the charge that the legislation was in aid of religion, declared: "Neither can it be said that such legislation, or such taxation, is in aid of a church, or of a private, sectarian, or parochial school, nor that it is other than what it is designed and purports to be, . . . — legislation for the health and safety of our children, the future citizens of our state."[85] The indirect and incidental benefits that may accrue to the parochial school do not vitiate the primary and principal purpose of the legislation. "The fact that in a strained and technical sense the school might derive an indirect benefit from the enactment," said the court, "is not sufficient to defeat the declared purpose and the practical and wholesome effect of the law."[86] Thus the Court of Appeals of Kentucky unanimously upheld the right of children to exercise their religion in the choice of school they wish to attend, without suffering economic reprisals.

A year before the important Supreme Court decision[87] involving the right of parochial school children to share in bus transportation facilities, a California court handed down a noteworthy decision.[88]

Plaintiff in the California case attacked the validity of the Educational Code which permitted any school district to transport parochial school children "upon the same terms

84 *Id.* at 934.

85 *Id.* at 934-35.

86 *Ibid.*

87 Everson v. Board of Education, 330 U.S. 1 (1947).

88 Bowker v. Baker, 73 Cal. App. 2d 653, 167 P.2d 256 (1946).

and in the same manner and over the same routes of travel as is permitted pupils attending the district school."[89] It was contended that this provision violated the article of the state constitution prohibiting any aid to religious schools.[90] It was further contended that the provision violated the constitution in that it prohibited appropriation in support of religious schools.[91]

The court quoted with approval a principle enunciated in an earlier case,[92] namely, that a statute "is not to be declared invalid, because, incidental to the main purpose, there results an advantage to individuals."[93] Also quoting the same decision, the court declared that "the legislature is vested with large discretion in determining what is for the public good and what are public purposes for which public moneys can be rightfully expended and that discretion cannot be controlled by the courts except when its action is clearly evasive."[94]

With regard to the all important question as to whether the child or the school is the primary beneficiary of the transportation provision, the court declared:[95]

> It is generally held that the direct benefit conferred is to the children with only an incidental and immaterial benefit to the private schools; that this indirect benefit is

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89 *Id.* at 257.

90 *Id.* at 258.

91 *Ibid.*

92 People v. Standard Accident Ins. Co., 42 Cal. App. 2d 409, 108 P.2d 923, 926 (1941).

93 Bowker v. Baker, 73 Cal. App. 2d 653, 167 P.2d 256, 258 (1946).

94 *Ibid.*

95 *Id.* at 260. Justice Marks found a guide in the statement of Chief Justice Hughes of the United States Supreme Court in Cochran v. Louisiana Board of Education, 281 U.S. 370, 375 (1930). The Supreme Court, in holding the distribution of textbooks to parochial school children valid, said through Chief Justice Hughes: "Viewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matter of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."

> not an appropriation of public moneys for private purposes and does not violate any constitutional provisions against giving State aid to denominational schools.

The transportation of children to parochial schools serves a public purpose. This is the conclusion reached by the California court when it declared that relevant decisions reviewed "support the theory that where the main purpose of an enactment is lawful, and an incidental or immaterial benefit results to some person or organization, which benefit is not directly permitted by law, this incidental benefit alone will not defeat the legislation, its main purpose being lawful."[96]

Furthermore, the primary beneficiary of the transportation provision is the child. On the basis of the public purpose principle, the district court concluded that:[97]

> If the transportation of pupils to and from public schools is authorized, as it certainly is, and if the benefit from that transportation is to the pupils, than [*sic*] an incidental benefit flowing to a denominational school from free transportation of its pupils should not be sufficient to deprive the legislature of the power to authorize a school district to transport such pupils.

Reasoning from the already approved[98] transportation of veterans to numerous denominational colleges and universities, the court maintained that:[99]

> If the direct payment by the State of the transportation costs of the veteran between his home and such an institution of learning . . . is not a violation of the constitutional provisions, then certainly permitting a little child to occupy a vacant seat in a school bus in order that he might attend a denominational school cannot be held to be such a violation.

The court, reverting to the question of incidental aid

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96 *Id.* at 261.

97 *Ibid.*

98 Veterans' Welfare Bd. v. Riley, 189 Cal. 159, 208 Pac. 678 (1922).

99 Bowker v. Baker, 73 Cal. App.2d 653, 167 P.2d 256, 262 (1946).

to denominational schools, noted that in the complexities of modern life "many expenditures of public money give indirect and incidental benefit to denominational schools and institutions of higher learning. Sidewalks, streets, roads, highways, sewers are furnished for the use of all citizens regardless of religious belief."[100] The California court, moreover, reduced the expression of the New York Court of Appeals in the *Judd*[101] case—"without [bus transported] pupils there could be no school"—to absurdity by observing that "without roads over which pupils could reach the school there would be no school."[102]

Since "the promotion of the safety of the children of the State is an important function of government, just as much so as their education,"[103] and since the right of a child to share equally in the welfare benefits of the state cannot be annulled by incidental and immaterial secondary effects, the court held that "the legislation [providing transportation for parochial school children] is constitutional and is not subject to the attack made here."[104]

Although the decision of the Supreme Court of New Jersey in the *Everson* case[105] was adverse to the interests of children in attendance at parochial schools, it should be discussed here because the dissenting opinion of Justice Heher formed the basis for subsequent favorable decisions.

The legislation in question was set forth by the court. It provided for equal transportation facilities for children attending "any school house . . . including the transportation of school children to and from school other than a public school, except such school as is operated for profit

100 *Ibid.*

101 Judd v. Board of Education, 278 N.Y. 200, 15 N.E.2d 576, 582 (1938).

102 See Note 99, *supra.*

103 *Ibid.*

104 *Id.* at 263.

105 Everson v. Board of Education, 132 N.J.L. 98, 39 A.2d 75 (Sup. Ct. 1944).

in whole or in part."[106] So also the applicable constitutional provisions were set forth.[107]

The supreme court found that the legislative provision for the transportation of parochial school children was unconstitutional as a misappropriation of the constituted fund for the support of free schools.[108] This holding was based upon the judicial viewpoint that transportation is primarily in aid of the school and only secondarily or incidentally a benefit for the children transported.

Inasmuch as the substance of Justice Heher's dissent was to become accepted doctrine in the New Jersey Court of Errors and Appeals' decision,[109] reversing the holding of the supreme court, it deserves consideration here. Justice Heher disagreed with the majority on the fundamental question of who is the beneficiary of bus transportation. "Such transportation is a service to the children and their parents rather than to the schools," declared the Justice, "for otherwise the parents would be obliged to provide the conveyance or incur the traffic hazards incident to the journey, for which children are generally so ill-equipped."[110] Such service to children, continued the minority, "is in no real sense a contribution to 'the use' or the maintenance of the institutions which the children attend. . . . and such provision is in the exercise of what I deem to be an unquestionable public function."[111]

The distinction between aid to the child and his parents, on the one hand, and aid to the school, on the other, is fundamental. Concerning this distinction, Justice Heher

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106 *Id.* at 76.

107 *Id.* at 76-77.

108 *Id.* at 76.

109 Everson v. Board of Education, 133 N.J.L. 350, 44 A.2d 333 (Ct. Err. & App. 1945).

110 Everson v. Board of Education, 132 N.J.L. 98, 39 A.2d 75, 77 (Sup. Ct. 1944).

111 *Ibid.*

said:[112]

> If this transportation provision be viewed apart from the institutions themselves, and considered as an aid to parents in making educational facilities of their choice available to their children with a measure of safety, in the service of an essential public interest, it seems to me that constitutional doubts lose their force. As so viewed, the act is in aid of compulsory education, a primary concern of society.

Justice Heher based persuasive arguments on the fact that "school attendance is compulsory." The state, by reason of its prerogatives, "may compel parents to perform the natural duty of education owed to their children, and aid them in so doing, except as restrained by constitutional limitations."[113] Constitutional guaranties of religious liberty act as limitations upon the function of the state in the educational field. Consequently, "compulsory attendance at a public school, whether the compulsion be direct or *indirect,* would violate constituutional guaranties."[114] The denial to children who have elected to attend a parochial school of the right to share equally with other children in such welfare legislation as bus transportation is an indirect compulsion to attend a public school. Resisting the compulsive pressure means suffering economic reprisals. This element of constraint violates religious liberty.

In the opinion of the minority, the transportation of school children has a twofold purpose—to facilitate compliance with the attendance law, and to protect children against highway hazards. "The statute under review facilitates the attendance at both classes of schools, [i.e., public and private] of children remotely situated," said the Justice, " and thus contributes substantially to the effectuation of the statutory provisions for compulsory education, and

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112 *Id.* at 77-78.

113 *Id.* at 77.

114 *Ibid.* (Emphasis added.) See Pierce v. Society of Sisters, 268 U.S. 510 (1925).

at the same time considers the factor of safety — a reasonable measure to those ends."[115] In view of these facts, Justice Heher declared:

> I cannot find in any of our constitutional prohibitions a purpose to deny such transportation to children of non-profit private schools, seeking the education which satisfies the standard of the compulsory education law.[116]

With regard to the majority holding that the extension of the welfare provision to parochial school children was a misappropriation of public school funds, the dissent declared that "there is no proof whatever that any part of the State school fund was . . . used" for the transportation of such children. Consequently, since the constitutional mandate has reference "only to what may be done with the constituted school fund, not what may be done with the general funds of the State," it has no relevance in the instant case.[117] The Court of Errors and Appeals of New Jersey, to which the decision of the supreme court was appealed, declared, with reference to this point:[118]

> A meticulous examination of the record shows an absolute lack of any such proof. . . .
> . . . [T]he record before us is barren of any evidence as to the source of the funds from which the challenged payment . . . was made.

Unless there is evidence to the contrary, the court must assume that the payment was made lawfully from funds other than the state school fund. The contrary may not be assumed. The court will presume in favor of the constitutionality of a statute.[119]

The court brought to notice the fact that "the com-

115 *Ibid.*

116 *Ibid.*

117 *Id.* at 79.

118 Everson v. Board of Education, 133 N.J.L. 350, 44 A.2d 333, 335-36 (Ct. Err. & App. 1945).

119 *Id.* at 336.

pulsory education statutes impose on the *parents* . . . an absolute duty . . ." and that these statutes are "penal in nature for a violation of which parents may be convicted as disorderly persons, . . ."[120] Since compliance with the compulsory attendance law is sometimes "practically impossible," and as a result parents may be subjected to prosecution through no fault of their own, "the statutes looking to transportation became complementary to and in aid of the compulsory education statutes."[121]

Furthermore, bus transportation for school children is welfare legislation for a public purpose. Consequently, the transportation of children in attendance at parochial schools "is a public matter and moneys expended therefor . . . do not constitute the expenditure of public moneys for private purposes."[122] Thus the highest court of New Jersey did not deprive children who had elected particular schools on the basis of their religious beliefs of the right to share in the benefits of welfare legislation on an equal basis with other children similarly situated with respect to the purpose of the law. These children were not made to suffer economic reprisals as the price of having exercised a right guarantied by the first amendment.

On appeal to the Supreme Court appellants contended, first, that the statute of New Jersey took, by taxation, the private property of some and bestowed it on others; and, secondly, that the statute provided for the use of public money to help support and maintain sectarian schools.[123]

With reference to the first contention, it was sufficient for the Court that the New Jersey legislature had decided that a public purpose would "be served by using tax-raised funds to pay for the bus fares of all school children,

120 *Id.* at 337.

121 *Ibid.*

122 *Ibid.*

123 Everson v. Board of Education, 330 U.S. 1, 5 (1947).

including those who attend parochial schools."[124] What serves a public need and public purpose is for the state legislature to determine. "The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need."[125]

With the advent of changing conditions and new concepts regarding the function of government, the state has undertaken new types of public service for the promotion of the general welfare. Consequently, the Court declared that it was too late to argue that the legislation served no public purpose.[126]

Had the Court found the second contention true, transportation for parochial school children would unquestionably have been found unconstitutional since it was in the *Everson* case that the Court enunciated the new doctrine of absolutely no aid to one religion or to all religions.[127] The Court, however, viewed transportation as welfare legislation to which all school children similarly situated with respect to the purpose of the law have an equal right. To deny the benefits of welfare enactments to children because of their religious belief would be to violate their rights under the first and fourteenth amendments. The Court, though zealous in its efforts to prohibit even the smallest public aid to religion,[128] was not unaware that "other language of the [first] amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion."[129] To deny parochial school children the right to share equally in the benefits of state welfare

124 *Id.* at 6.

125 *Ibid.*

126 *Id.* at 7.

127 *Id.* at 15-16.

128 See McCollum v. Board of Education, 333 U.S. 203 (1948).

129 Everson v. Board of Education, 330 U.S. 1, 16 (1947).

legislation would be to "hamper" them "in the free exercise of their own religions."

On the basis of the first amendment guaranty of the free exercise of religion, the Supreme Court enunciated the important principle that the state "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."[130] Such exclusion would be discrimination on religious grounds — a violation of both the first and fourteenth amendments.

The Court, referring to the constitutional guaranty of religious freedom and the equal protection of the laws, declared that "we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief."[131] Individual citizens have a personal right to share in the benefits of civilized society. A share in these benefits may not be denied because an incidental advantage may accrue to religion as a byproduct. In the distribution of its benefits the state must be blind to the religious beliefs of its citizens.

These principles of liberty induced the Court to hold that when the state provides transportation for parochial school children:[132]

> The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

130 *Ibid.*

131 *Ibid.*

132 *Id.* at 18.

Thus the Supreme Court adopted the viewpoint that transportation for school children is in aid of the child and not in aid of the school. [133] Such transportation serves a public purpose; consequently, all those children who are similarly situated with respect to the purpose of the law must be treated alike. School children may not be denied the benefits of public welfare legislation *because of their faith.*[134]

V.

BUS TRANSPORTATION: AID TO THE SCHOOL

The Supreme Court of Wisconsin was not called upon to express its views on the question as to whether the transportation of school children was a service to the child or in aid of the school in two cases,[135] but these cases should be discussed here. In the *Van Straten* case the transportation of children to a parochial school was held invalid by reason of unauthorized exercise of power by the district school board.[136] A statutory authorization to transport the children of discontinued district schools to schools in adjoining districts and to pay their tuition there is not,

133 *Ibid.* The Court emphasized this when it added at p. 18: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here."

134 The writer finds it impossible to reconcile this application of the principles of religious liberty and the equal protection guaranty of the fourteenth amendment with the reservations stated by the Court when it said: "While we do not mean to intimate that a state could not provide transportation only to children attending public schools. . . ." at p. 16. This puts the Court in the position of saying that while the state "cannot exclude individual . . . members of any faith, *because of their faith* . . . from receiving the benefits of public welfare legislation," it may, nevertheless, exclude individuals from receiving "its general state law benefits" *because of their faith.*

135 State *ex rel.* Van Straten v. Milquet, 180 Wis. 109, 192 N.W. 392 (1923); Costigan v. Hall, 249 Wis. 94, 23 N.W.2d 495 (1946).

136 State *ex rel.* Van Straten v. Milquet, 180 Wis. 109, 192 N.W. 392, 395 (1923).

said the court, authority to transport children to other than district schools. Consequently, the court held that the contract made by the district board to provide transportation of pupils to a private school was an act beyond its authority and therefore invalid.[137]

The matter of unauthorized exercise of power by a district school board was also the issue before the Wisconsin court in the *Costigan case.* A statutory provision that authorized the transportation of the children of a suspended district school to another district school was in issue.[138] Since this was the extent of the board's power, the court held that the transportation of parochial school children was unauthorized and consequently unlawful on the principle that "the board has only such powers as to transportation of pupils as are conferred on it by the statute."[139]

The Superior Court of Delaware took a forthright position on the fundamental question as to who is the beneficiary of welfare legislation providing transportation for school children.[140] "We are of the opinion that to furnish free transportation to pupils attending sectarian schools, is to aid the schools," and is, consequently, unconstitutional.[141] This holding relied on the Delaware constitution which provided that state appropriated funds for educational purposes should not be used by, or in aid of any sectarian church or denominational school.[142] Though petitioner contended that this prohibition applied only to appropriations from the school fund and that it did not apply to appropriations from the general fund, the

137 *Ibid.*

138 Costigan v. Hall, 249 Wis. 94, 23 N.W.2d 495, 497 (1946).

139 *Ibid.*

140 State *el rel.* Traub v. Brown, 6 W.W. Harr. 181, 172 Atl. 835 (Super. Ct. 1934).

141 *Id.* at 837.

142 *Id.* at 836.

court rejected the contention.[143]

Even while applying the constitutional prohibition against the use of *any public funds* whatsover in aid of denominational schools, the court could not show how the giving of a bus ride to a child amounted to the "appropriation" or "use" of public funds in aid of sectarian schools. Consequently, the court argued that the transportation of children to parochial schools was unconstitutional because it "helps build up, strengthen and make successful the schools as organizations."[144] If this is the result of public financed transportation, it is, nevertheless, an incidental intangible benefit accruing to a denominational school. To avoid such benefits, it was necessary to avoid such conditions of equality as would enable a child to choose to attend a parochial school without suffering economic reprisals. Children enjoying conditions of equality with respect to transportation might elect to attend parochial schools. Such conditions would, as a consequence, "help build up, strengthen and make successful the schools as organizations." To avoid these consequences, the supreme court denied to these children the conditions of equality that are demanded by the fourteenth amendment and are, in many instances, the essential prerequisites to freedom of choice. This amounts to compulsive attendance at public schools, even against religious convictions.

On the basic question as to who primarily benefits from the transportation of school children, the supreme court, and the Court of Appeals of the State of New York sharply disagreed. When the supreme court held[145] that such transportation was in aid of the child, it was reversed by the court of appeals on the grounds that such welfare legis-

143 *Ibid.*

144 *Id.* at 837.

145 Judd v. Board of Education, 164 Misc. 889, 300 N.Y. Supp. 1037, 1040 (Sup. Ct. 1937).

lation was in aid of the school.[146]

Though the results of the decision of the court of appeals in the *Judd* case have been nullified by a constitutional amendment,[147] the considerable influence of the court opinion in other jurisdictions[148] justifies giving more space to this case than would normally be given to a decision whose effects have been substantively altered by the amending process.

In 1936 the legislature of the State of New York amended the Education Law in favor of parochial school children to facilitate compliance with the state compulsory school attendance law.[149]

Plaintiff contended that the law violated Article IX, section 4, of the state constitution which provides that the state shall not use its property or public money directly or indirectly, in aid or maintenance of any school of any religious denomination.[150] The supreme court rejected this contention. "It does not appear that any of the taxpayers' money . . . is being used or spent to aid or maintain the

146 Judd v. Board of Education, 278 N.Y. 200, 15 N.E.2d 576, 582 (1938).

147 N.Y. CONST. art. XI, § 4 (1894) was amended to read that ". . . the legislature may provide for the transportation of children to and from any school or institution of learning." This constitutional amendment was challenged in Application of Board of Education, 199 Misc. 631, 106 N.Y.S.2d 615 (Sup. Ct. 1951). The petitioner sought to avoid the acting commissioner of education's order directing the board of education to provide transportation for parochial school children. On the basis of the constitutional amendment, the petition was dismissed.

148 See Visser v. Nooksack Valley School Dist., 33 Wash. 2d 699, 207 P.2d 198 (1949); Everson v. Board of Education, 132 N.J.L. 98, 39 A.2d 75 (Sup. Ct. 1944); Mitchell v. Consolidated School Dist., 17 Wash. 2d 61, 135 P.2d 79 (1943).

149 N.Y. EDUCATION LAW § 206, subdivison 18 (1910) provided that ". . . whenever in any school district children of school age shall reside so remote from the school house therein or the school they legally attend that they are practically deprived of school advantages during any portion of the school year, the inhabitants thereof entitled to vote are authorized to provide, by tax or otherwise, for the conveyance of any or all pupils residing therein (a) to the schools of such city, or district . . . or (b) to the school maintained in said district and to schools, other than public, situate within the district or an adjacent district or city. . . ."

150 Judd v. Board of Education, 164 Misc. 889, 300 N.Y.Supp. 1037, 1039 (Sup. Ct. 1937).

denominational school in question."[151] To the important question as to whether the parochial school would stand to gain or lose if no means of transportation were afforded its students, the court answered without qualification that "it would not."[152]

The right of children to share equally in welfare benefits provided by the state is a personal right. In providing bus transportation for children living a long distance from the school they legally attend, the state is providing for the needs of its children. The needs of children as wards of the state are distinct from the needs of parochial schools as institutions. On the basis of this primary principle of the personal rights of the individual, as distinct from the disabilities of institutions, the court declared that "the service afforded by this . . . law is distinct and independent of the school itself and is intended solely for the convenience of the pupils and to promote their education, and is not 'aid or maintenance' of a denominational school. . . ."[153]

Not only was the question of personal rights relevant to the case, found the supreme court, but also the question of religious liberty. "To discriminate against the pupils of denominational schools would be, in effect, an unreasonable interference of the rights of their parents in determining where their children should be educated."[154] This compulsion would be in conflict with the state constitutional provision which provides for religious freedom.[155]

In the court of appeals this reasoning of the supreme court was totally rejected. Faced with the argument that was conclusive in the supreme court, namely, that the transportation of children primarily benefits the children

151 *Id.* at 1040.

152 *Ibid.*

153 *Ibid.*

154 *Ibid.*

155 N.Y. CONST. art. I, § 3 (1894).

and not the school, the court af appeals, brushing aside the reasoning, declared: "That argument is utterly without substance."[156] Children may not be transported to parochial schools because "free transportation of pupils induces attendance at the school." Furthermore, "the purpose of transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it."[157] The court did not show if and how the constitutional prohibition against the use of the state's property or credit or any public money in aid of any school under the control of any religious denomination was violated.[158]

The court's conclusion, however, that "free transportation of pupils induces attendance at the school," amounts to a finding that treating equally all children similarly situated with respect to the purpose of the law creates conditions which make possible the *free* exercise of religion — an exercise that does not entail consequent economic reprisals — in the choice of school. The court held in effect that this condition of religious freedom must be avoided because it "induces" attendance at parochial schools and "promotes" the interest of these schools. Conditions of equality make possible freedom of choice. Freedom of choice makes possible the election to attend a denominational school. It is submitted that in restricting this freedom of choice and freedom of conscience the Court of Appeals of New York violated religious liberty and the equality guaranty of the fourteenth amendment.

This abridgment of religious liberty hardly meets the minimum requirements of the clear and present danger rule. Must the religious freedom of school children be abridged because there is a clear and present danger to the state if these children are permitted to choose to

156 Judd v. Board of Education, 278 N.Y. 200, 15 N.E.2d 576, 582 (1938).

157 *Ibid.*

158 *Id.* at 580.

attend parochial schools free of economic reprisals? Does the avoidance of this "inducement" to attend parochial schools justify violating the religious liberty of school children?

If bus transportation can be denied to parochial school children because it is a *sine qua non* necessity for the operation of parochial schools, as the court intimated by arguing that "without pupils there could be no school,"[159] then, for the same reason, these children could be denied the use of public streets and sidewalks. If the essentiality of transportation makes it an unconstitutional aid to denominational schools, *a fortiori* the essentiality of streets and sidewalks makes them unconstitutional aids to denominational schools. And if these may be denied to children attending a school that teaches religion, *a fortiori* they may be denied to people on their way to a church, a synagogue, or religious assembly. With regard to the essentiality of transportation for the operation of schools, it should be observed that schools long existed before buses came into vogue.

If children attending parochial schools may be deprived of the personal right to share equally in welfare benefits because of an *immaterial* benefit that may accrue to denominational schools as a result of such sharing, on what basis can such substantial aids as police protection, tax exemption, sewer connections, fire protection, and compulsory attendance at sectarian schools be approved?

In 1941 the Supreme Court of Oklahoma held that the transportation of children to parochial schools was primarily in aid of the school as such.[160] The state statute invalidly incorporated the equality principle of the fourteenth amendment. It provided that all children attending any private or parochial school under the compulsory

159 *Id.* at 582.

160 Gurney v. Ferguson, 190 Okla. 254, 122 P.2d 1002 (1941).

school attendance laws of this State shall be equally entitled to the same rights, benefits and privileges as to transportation that are provided by the district school board.[161]

The Oklahoma constitution has the usual prohibition with regard to the use of public funds for a sectarian institution as such.[162]

Plaintiff urged, among other things, that the transportation provision did not result in the use of public funds for the benefit or support of the sectarian institution "as such," but that the benefit accrued to the individual child as distinguished from the school as an organization.[163] The emphasis was placed on the personal right of the individual child to share in the benefits of the welfare legislation of the state.

The supreme court of the state, however, held that such welfare legislation as transportation is primarily in aid of the sectarian school. "When pupils of a parochial school are transported . . . such service . . . [is] in aid of that school."[164] Though the purpose of the enactment was to give "the same rights, benefits and privileges as to transportation" to all children complying with the compulsory attendance laws, the court declared that "when such aid is purported to be extended to a sectarian school there is in our judgment a clear violation of . . . our Constitution."[165]

Under this holding the individual parochial school child is burdened with the constitutional disabilities of the school he legally attends. Though his right to share equally with other children in welfare benefits is a personal right, this right is annulled because of his religious beliefs. By reason of the fact that the child has exercised a right guarantied

161 *Id.* at 1003.

162 OKLA. CONST. art. II, § 5. *Ibid.*

163 *Ibid.*

164 *Id.* at 1004.

165 *Ibid.* On appeal of this decision to the Supreme Court of the United States it was dismissed for want of jurisdiction. Gurney v. Ferguson, 317 U.S. 588 (1942).

and protected by the first amendment, he is deprived of the right to share in the benefits of welfare legislation on an equal basis with other children similarly situated with respect to the purpose of the law.[166]

In Kentucky the court of appeals, citing the *Gurney* decision as persuasive authority, reversed a circuit court and held the law providing bus transportation for children attending parochial schools unconstitutional.[167] The law thus annulled had provided that "pupils attending private schools shall be entitled to the same rights and privileges as to transportation to and from school as are provided for pupils of public schools."[168]

The question of who benefits by the transportation of children to school was clearly raised in the Kentucky case. Appellant contended that the enactment constituted a misuse of public school funds and an appropriation of public funds for a sectarian purpose.[169] Defendants contended that the act:[170]

> . . . was a valid exercise of police power and that children attending private schools were merely complying with compulsory laws of this State and were under the supervision of the State Board of Education . . . and [that] the Act was for the aid of the *pupils* and not for aid of the *schools.*

Though the Kentucky court conceded that the issues and principles involved in the textbook case[171] decided by

166 In Cantwell v. Connecticut, 310 U.S. 296 (1940), the Supreme Court of the United States made the first amendment guaranty of religious liberty applicable against state violations by way of the fourteenth amendment.

167 Sherrard v. Board of Education, 294 Ky. 469, 171 S.W.2d 963 (1942).

168 *Id.* at 964.

169 *Id.* at 965-66. KY. CONST. § 171 as far as is pertinent, reads: ". . . Taxes shall be levied and collected for public purposes only. . . ." Section 183 states: "The general assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state." Section 184 provides, among other things, that: "No sum shall be raised or collected for education other than in common schools until the question of taxation is submitted to the legal voters. . . ."

170 *Id.* at 964.

171 Cochran v. Board of Education, 281 U.S. 370 (1930).

the Supreme Court in 1930, were similar to those involved in the instant case, it asserted that it was ". . . not inclined to follow the rule announced in that case, and perhaps other similar cases.[172] In the *Cochran* case the Supreme Court upheld the validity of state distribution of textbooks to children attending parochial schools on the grounds that the children and the state were the primary beneficiaries of the program, not the schools.[173] The court of appeals, having rejected this rule and adopted the *Gurney* rule that transportation is primarily in aid of the school, declared that the act was unconstitutional and void.[174]

A Washington statute providing bus transportation for the health, welfare and safety of children attending elementary schools and high schools was tested.[175] The court pointed out that the purpose of the law was to minimize traffic hazards to school children.[176] The benefits of the enactment were extended to all children similarly situated with respect to the purpose of the law — none were excluded.[177]

The supreme court held the statute unconstitutional. Basic to the court's decision is the viewpoint that transportation is primarily in aid of the school.[178] The court found that the transportation of parochial school children ". . . necessitates the use of common school funds for other

172 Sherrard v. Board of Education, 294 Ky. 469, 171 S.W.2d 963, 966 (1942).

173 Cochran v. Board of Education, 281 U.S. 370, 375 (1930).

174 Sherrard v. Board of Education, 294 Ky. 469, 171 S.W.2d 963, 968 (1942).

175 Mitchell v. Consol. School Dist., 17 Wash. 2d 61, 135 P.2d 79, 80 (1943).

176 *Ibid.*

177 *Ibid.* The Act provided that ". . . all children attending any private or parochial school under the compulsory school attendance laws of this state shall . . . be entitled equally to the same rights, benefits and privileges as to transportation as are so provided for by [the] district school board for pupils attending public schools."

178 *Ibid.*

than common school purposes."[179] The supposition here is that the transportation of public school children is for "common school purposes"—that is, that this welfare function of the state is part of the educational activity of the public school. Thus by the simple expedient of including state welfare programs in the public school educational activities, all non-public school children are excluded from the benefits of the program, though they are similarly situated with respect to the purpose of the law. It must be said that this procedure deprives the individual child of his rights under the fourteenth amendment. The rights of the individual child, under the equality provision, to share in the benefits of the state's welfare enactments are present and personal—they are in no way determined by his attending one institution rather than another. The mere administration of the state's welfare functions by the public school apparatus does not transform these functions into an integral part of the educational processes.

Appellants contended that the benefits of the statute inured exclusively to the children and their parents "in that it simply relieves them from the obligation incident to compulsory attendance statutes of providing transportation themselves."[180] This contention was rejected by the court. "We cannot . . . accept the validity of the argument that transportation of pupils to and from school is not beneficial to, and in aid of, the school."[181] Inasmuch as Article I, section 11, of the state constitution provides that "no *public money* or *property* shall be appropriated for or

179 *Id.* at 81. The provisions invoked in the instant case are WASH. CONST. art. IX, § 2: ". . . the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools." Art. IX, § 4: "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." Art. I, § 11: "No public money or property shall be appropriated for, or applied to any religious worship, exercise or instruction, or the support of any religious establishment. . . ."

180 *Ibid.*

181 *Id.* at 81-82.

applied to . . . any religious [institution] . . .,"[182] it would seem necessary to determine whether the "benefit" and "aid" that transportation gives to the school is an appropriation of "public money or property."

The court, relying heavily on the reasoning of the New York Court of Appeals in the *Judd* case, left no doubt as to its conclusions regarding the primary beneficiary of the welfare legislation and the nature of the aid given to the private schools. The school is the primary beneficiary: "We think the conclusion is inescapable that free transportation of pupils serves to aid and build up the school itself." Pupils and their parents are the secondary beneficiaries: "That pupils and parents may *also* derive benefit from it is beside the question."[183]

Thus the court, implicitly admitting that the statute made no appropriations of public money or property for the benefit of the denominational school, invalidated the enactment because the byproduct of the law's operation "*serves* to aid and build up the school." In support of its position, the court referred to the doctrine enunciated in the *Judd* case, namely, that "free transportation of pupils induces attendance at the school."[184] That is to say, the secondary, incidental, and immaterial effects of a law providing equal transportation facilities for all children, irrespective of school attended, may benefit a parochial school inasmuch as it may make it possible for some children to elect to attend a parochial school who could not otherwise do so. The removal of this compulsion to attend public schools, in the thinking of the Washington Supreme Court, serves to aid and build up parochial schools.[185] This

182 *Id.* at 81. (Emphasis added). See note 179, *supra.*

183 *Id.* at 82. (Emphasis added).

184 Judd v. Board of Education, 278 N.Y. 200, 15 N.E.2d 576, 582 (1938). (Emphasis added).

185 The incongruities are apparent. While it is quite evident that the court made the school the primary beneficiary of the enactment, it seems no less clear that the court's real objection lay in the incidental by-products of the law's operation.

secondary, incidental, and unintended effect of the law's operation, according to the court, annuls the primary and declared purpose of the enactment: [186]

> . . . the purpose of the act is to avoid and minimize the accidents and traffic hazards to which children of school age are subjected in "attending elementary schools and high schools in accordance with the laws of this state."

To avoid the incidental and unintended byproducts of the transportation law's operation that may accrue to a denominational school, the court denied to parochial school children the equal protection of the laws and the free exercise of religion. According to the demands of the clear and present danger rule, there must be, to justify abridging religious freedom, a clear and immediate danger of an evil that the state has a right to suppress. The "evil" in the instant case that must be avoided is the condition of equality that enable children to choose, on the basis of religious convictions, the school they wish to attend without suffering economic reprisals. These conditions of equality, relative to transportation, serve to aid and build up the school the children elect to attend. To avoid these incidental and immaterial consequences, the court abridged the religious liberty of plaintiff's children.

In this holding the Supreme Court of Washington rejected the declared purpose of the legislature in the exercise of its police power. The dissenting opinion took issue with the majority on this score and others: [187]

> It is . . . elementary that a statute regularly enacted by the legislature, is clothed with the presumption of constitutionality. When a statute is actually enacted in the exercise of the police power, this presumption is especially strong. Indeed, in practice at least, the presumption is then regarded as almost conclusive.
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> . . . it is also elementary that, in questioning the con-

186 Mitchell v. Consol. School Dist., 17 Wash. 2d 61, 135 P.2d 79, 80 (1943).

187 *Id.* at 85-86.

> stitutionality of a statute, all doubt must be resolved in favor of the legislature.

When a writ of mandamus was sought to compel compliance with a later enacted statute,[188] the Supreme Court of the State of Washington, citing constitutional provisions,[189] resolved the question of the constitutionality of the enactment into the query: Does transportation for children to denominational schools constitute "support or maintenance of such schools?"[190] The court answered in unequivocal terms. "In both inception and operation of schools, transportation thereto and therefrom is a vital and continuous financial consideration."[191] Thus the court, by making the exercise of the police power for the alleviation of the burdens and dangers consequent upon compliance with the state compulsory school attendance laws an integral part of the educational operation, brought this welfare function of the state under the constitutional provisions prohibiting support of denominational schools. This exercise of the police power for the health, safety, and welfare of all the children of the state, regardless of religious beliefs, was, consequently, held unconstitutional.

The purpose of the state legislative enactment was to alleviate a need. The legislators extended the benefits of the enactment to all the state's children similarly situated with respect to the purpose of the law. None were excluded because of their religious beliefs. The right of the individual child to share in the benefits of the legislation was considered a personal right. Equality under the law demanded that the child's right to share in the welfare benefits of the state have no dependence on the nature

188 Visser v. Nooksack Valley School Dist., 33 Wash. 2d 699, 207 P.2d 198, 200 (1949).

189 See note 179, *supra*.

190 Visser v. Nooksack Valley School Dist., 33 Wash. 2d 699, 207 P.2d 198, 203 (1949).

191 *Ibid.*

or character of institutions or organizations to which he might be attached, or at which he might attend. His exercise of religion in the choice of school could, in the mind of the legislators, in no way disqualify him from sharing in these benefits. Such disqualification would hamper him in the exercise of his religion; it would be a compulsion forcing him to attend a school contrary to his religious convictions. In the *Everson* case the Supreme Court had declared that the state cannot ". . . hamper its citizens in the free exercise of their own religion," and that therefore:[192]

> ". . . it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation."

Furthermore, the Supreme Court, it will be recalled, declared that in providing bus transportation for parochial school children:[193]

> The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

The Supreme Court of the State of Washington, on the other hand, declared that transportation is ". . . a vital and continuous financial consideration. . . . a direct, substantial, and continuing public subsidy to the schools, *as such.* . . ."[194] The *Everson* decision was based upon the distinction between welfare benefits provided for school children, on the one hand, and public support of the school, on the other hand. This distinction, so fundamental to

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192 Everson v. Board of Education, 330 U.S. 1, 16 (1947).

193 *Id.* at 18.

194 Visser v. Nooksack Valley School Dist., 33 Wash. 2d 699, 207 P.2d 198, 203 (1949).

the highest court of the nation, was rejected by the Washington court. "To pursue such a distinction involves semantic abstractions beyond the pale of reality."[195]

This distinction, nevertheless, is fundamental. A person does not lose his rights under the Constitution by joining the Masons, or the Catholic Church, or the Lutheran Church. He does not lose his rights by attending Southern Methodist University, or the Hebrew Union College, or the Catholic University of America. A person does not lose his constitutional rights by joining the American Federation of Labor, or the Chamber of Commerce, or the American Medical Association. This principle is so fundamental to the American concept of liberty and equality that it is difficult to see how it could ever have been questioned. Our constitutional rights are *personal;* neither are they derived *from* membership in an organization, nor are they lost *because* of membership in an organization. Membership in, or attendance at, a synagogue, or church, or parochial school, or labor union, or chamber of commerce is not determinative of our constitutional rights.

Because the Supreme Court of Washington rejected this fundamental principle of liberty, it was forced to conclude that:[196]

> . . . we must . . . respectfully disagree with those portions of the Everson majority opinion which might be construed, in the abstract, as stating that transportation, furnished at public expense, to children attending religious schools, is not *in support* of such schools.

Since this court held that the state may not protect parochial school children from the dangers and hazards of highway traffic because such protection is a direct and substantial public subsidy of the parochial schools as such, it is interesting, if somewhat facetious, to speculate whether the court would bar the use of state-provided

195 *Id.* at 204.

196 *Id.* at 205.

bomb shelters to these children in the event of an atomic bomb attack on the City of Seattle on the grounds that such protection would be a direct and substantial public subsidy of the parochial schools as such.

In contrast with the doctrine of the Washington court, the statements of the Supreme Court of Mississippi in defense of the right of parochial school children to share equally in the welfare benefits of the state are worthy of notice. "The state which allows the pupil to subscribe to any religious creed should not, because of his exercise of this right, proscribe him from benefits common to all."[197] The exercise of this right by the child does not deprive the state of its *right* and *duty* to legislate for the child's welfare. "If the pupil may fulfil its duty to the state by attending a parochial school it is difficult to see why the state may not fulfil its duty to the pupil by encouraging it 'by all suitable means.' "[198]

The legislature of the State of Iowa determined to assist the children of the state to fulfil their obligations under the compulsory school attendance law by directing the district school boards to provide suitable transportation for *every* child of school age attending school within the district.[199] In conformity with this statutory requirement, the Silver Lake Consolidated School District provided transportation for public school children and for children ". . . who attended a parochial school in [the town of] Ayrshire which was operated and conducted in conformity with the laws in the state of Iowa applicable to private schools."[200]

The plaintiff, consolidated school corporation, in a suit for a declaratory judgment, argued that it was acting in

197 Chance v. Mississippi State Textbook Bd., 190 Miss. 453, 200 So. 706, 710 (1941).

198 *Ibid.*

199 Consolidated School Dist. v. Parker, 238 Ia. 984, 29 N.W.2d 214, 217 (1947).

200 *Id.* at 216.

conformity with the express provisions of the statute authorizing transportation, under proper conditions, for every child of school age and that the history of consolidated school legislation in Iowa is that all children of school age are to be transported, and that taxation for transportation cost is based on the total number of children living in the district. [201]

Plaintiff likewise raised the question whether parents whose children are denied a legislative right because they exercise a constitutional right have suffered an abridgment of that constitutional right. The school district alleged: [202]

> . . . the right which parents have to educate their children in a private school, to be hollow and meaningless unless they have the right to be transported, and insists that the state did not attempt . . . to make compliance with the compulsory education act possible only on the condition that all children in rural areas attend the public schools.

The denial of transportation in rural areas may frequently operate as a compulsion to attend the public school. Such compulsion is incompatible with the right which parents have to educate their children in private or parochial schools if they comply with state standards.

The decision of the Supreme Court of Iowa is based on the supposition that to transport parochial school children is to exercise directive control over the parochial school. This supposition is, in turn, based on the thesis that such social welfare legislation as transportation is an integral part of the educational process, and that, consequently, authority over transportation is authority over the school itself. In line with this view, the Iowa court found the transportation of parochial school children invalid on the ground that the board of consolidated school district was not legally required to exercise jurisdiction

201 *Id.* at 218.

202 *Ibid.*

over private schools.[203] Though the terms of the transportation law effectively established the district school boards as agents of the state in carrying out a welfare function for all the children of the several districts, the court declared that: ". . . we are satisfied also that the power of local boards to provide for transportation is limited strictly to those who attend public schools."[204] Thus the individual child was deprived of his personal right to share in state-provided means for complying with the compulsory attendance law by the submerging of his legal personality into the character of the institution he legally attends.

Though the legislature of the State of Pennsylvania had made no explicit provisions for the transportation of children attending parochial schools, petitioner sought a writ of mandamus to compel respondents to furnish free transportation to his daughter to and from a parochial school.[205] Plaintiff alleged that there was an implied mandatory duty imposed by the school code of Pennsylvania to furnish transportation for his daughter since the code compelled her to attend regularly at the school of her choice. Defendants denied that there was any such duty, express or implied, imposed on them.[206]

The Supreme Court of Pennsylvania held that there was no duty implied from the school code that would necessitate that the defendants furnish free transportation for any pupil other than one attending the joint consolidated

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203 *Id.* at 219.

204 *Ibid.* Though repeal by implication is not favored in Iowa unless there is an absolute repugnancy between the new law and the old law, the court maintained, in the instant case, that inasmuch as the reference to transportation of children in the Code of 1946 did not specifically mention parochial school children it must have been the legislative intent to exclude them. *Cf.* p. 219. Here the court annulled the transportation provision of the Code of 1939, though there was not the slightest repugnancy between the two laws, and though the legislative history of the Code of 1946 strongly indicates that such was not the intent of the legislature.

205 Connell v. Bd. of School Directors, 356 Pa. 585, 52 A.2d 645 (1947).

206 *Id.* at 646, 648.

schools.[207]

Plaintiff's contention that the denial of transportation to his daughter practically resulted in coercion to attend a public school is not without merit.[208] Though the coercion was not being exerted by the board of directors, it was being exerted by the state legislature. The legislature imposed compulsory school attendance on all children, but it conditioned the right to share in the means—frequently essential—for complying with this law on attendance at a public school. This is compulsion to attend a public school. Such compulsion violates religious liberty and conditions the right to share equally in the benefits of welfare legislation on conformity in thought.

The legislature of Missouri amended its school transportation legislation in 1939 to ". . . include pupils attending private schools of elementary and high school grade except such schools as are operated for profit."[209] A section of the statute, furthermore, made provision for ". . . the distribution of state aid [from the general funds] for the transportation of pupils."[210] This enactment was challenged in 1953. The Supreme Court of Missouri,[211] on appeal from a circuit court, held that state funds appropriated for the transportation of school children coalesce with the public school moneys and could not, consequently, be used, free of constitutional prohibitions,[212] for the transportation of

207 *Id.* at 647.

208 *Id.* at 649.

209 McVey v. Hawkins, 258 S.W.2d 927, 930 (Mo. 1953).

210 *Ibid.*

211 *Ibid.*

212 *Id.* at 931. Mo. CONST. art. IX, § 5 provides: "The proceeds of all certificates of indebtedness due the state school fund, and all moneys, bonds, lands, and other property belonging to or donated to any state fund for public school purposes, and the net proceeds of all sales of lands and other property and effects that may accrue to the state by escheat, shall be paid into the state treasury, and securely invested under the supervision of the state board of education, and sacredly preserved as a public school fund the annual income of which shall be faithfully appropriated for establishing and maintaining free public schools, and for no other uses or purposes whatsoever."

parochial school children.[213] "We must and do hold that the public school funds used to transport the pupils [to the parochial school] . . . are not used for the purpose of maintaining free public schools and that such use of said funds is unlawful."[214] In this holding public school funds may be used for providing the benefits of welfare legislation for some of the children of the school district, but not for others. The classification is based on whether or not a child has exercised his rights under the first and fourteenth amendments to attend a parochial school. The classification is discriminatory and violative of religious liberty.

VI.

CONCLUSION

The equal protection guaranty of the fourteenth amendment demands that all children similarly situated with respect to the purpose of a state's welfare enactments must be treated alike. When the state, in the exercise of its police power, provides transportation for the purpose of protecting school children against the dangers and hazards of highway traffic, and for the purpose of facilitating, if not to make possible, compliance with the state compulsory school attendance laws, the state may not exclude from the benefits of such welfare legislation any child who is, with respect to the purpose of the law, similarly situated as other children. The right of the individual child, under the equality guaranty of the fourteenth amendment, to share in the benefits of such welfare legislation is personal. He may not be despoiled of his personal rights because an incidental and/or immaterial benefit may, as a byproduct of the legislation, accrue to an institution that could not legally be the direct beneficiary of state expenditures.

213 *Id.* at 932.

214 *Id.* at 933-34.

Under the guaranties of the first amendment parents may, for reasons of religious belief, send their children to denominational schools. And a child may, in the exercise of his religious belief, choose to attend a parochial school. This exercise of religion may not be subjected to government restraints—either by way of prior restraints or subsequent penalties.

A child may not be denied a share in the benefits of welfare legislation because of his religious beliefs. If a child is deprived, because of his religious beliefs, of the personal right to share in the benefits of welfare legislation, he is made to suffer economic reprisals on religious grounds. Such state-imposed deprivations are violations of his religious liberty and a denial of equal rights under the laws.

Bus transportation for school children is such welfare legislation. When it is provided for the children of the state to facilitate their compliance with the compulsory school attendance laws, and to protect them against the dangers and hazards of highway traffic, every individual child similarly situated with respect to the purpose of the law has a personal right to participate in the benefits of the legislation regardless of religious belief and practice. If a child is denied the right to share in such benefits because he has exercised his religious belief in the choice of school he attends, the state is violating his religious liberty. This imposition of economic reprisals, or the threat thereof, is a state-imposed penalty for having made the choice, or a state-exerted pressure against making such a religious choice. It is a penalty imposed for attending a parochial school, or a compulsion *not* to attend a parochial school. A necessitous child is not a free child. The imposition of such penalties and the exertion of such pressures to force children to conform in religious matters is forbidden by the first amendment.

The several states in the exercise of their police power have enacted a large number of distinct welfare programs

for the purpose of promoting the health, safety, morals, and welfare of their citizens. Each program has its distinct and definite purpose—a purpose that is neither determined by nor changed by the administrative techniques used for carrying the program into execution. To carry its welfare program into execution, the state is at liberty to use private agencies or public agencies. Whether the agent be private or public, the purpose of the program remains *always the purpose intended by the legislature.* The agent acts in conformity with the purpose of the principal.

The legislative purpose in providing bus transportation —to protect children from the dangers and hazards of the highways and to help them comply with the compulsory school attendance laws—is not transmuted into the school's distinct educational purpose by reason of the fact that the legislature has entrusted the execution of this welfare program to the public school administrative system. The school system is but the agent of the government in carrying the legislative program into effect. The purpose of the program remains distinct; the purpose does not become "education" by reason of the fact that the school has been selected as the agent of the government to administer the program on the local level.

By reason of the distinct purpose of the several welfare programs, it cannot be rightly said, for example, that a parochial school child may not share in bus transportation because the state constitution prohibits state aid to denominational schools. Such a contention is based on the supposition that all welfare programs—no matter what their purpose—that are administered through the agency of the public school system are in essence education and, consequently, subject to the prohibitions of the several state constitutions. This is to confuse the distinct purpose of the state legislatures in the adoption of a large number of social welfare programs with the legislative purpose in the operation of schools. All the state's police power

functions do not coalesce into the single notion of education. Nor do they become "education" merely because a public school apparatus is the convenient agent for effectuating the function.

All children similarly situated with respect to the purpose of the transportation legislation must be treated alike. Underinclusive classification, that is, the exclusion of children similarly situated with respect to the purpose of the law, is discriminatory and as such contrary to the equal protection guaranty of the fourteenth amendment.

When children are excluded from the benefits of such welfare legislation as transportation because of their religious exercise in the choice of school, their equal rights are denied and their religious liberty is impaired. They are made to suffer economic reprisals and penalties because of their religious beliefs. The imposition of such reprisals and penalties is a governmental interference in religion, an impelling compulsion *not* to exercise their religion in accordance with their religious convictions. Children who are allowed, as they must be, to elect to attend parochial schools but are, as a direct consequence of that exercise of religion, made to suffer penalties and economic reprisals enjoy a religious freedom only somewhat less restricted than the freedom of speech in Galsworthy's description of revolutionary Russia.[215]

*Virgil C. Blum**

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[215] Galsworthy, *American and Briton,* 8 Yale Rev. 27 (October, 1918). "Brothers, you know that our country is now a country of free speech. We must listen to this man, we must let him say anything he will. But, brothers, when he's finished, we'll bash his head in!"

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